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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
	)	
Policies and Procedures Regarding an Accelerated Docket for Complaint Proceedings	)	CC Docket No. 96-238
	)	
	)	
	)	

COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

MCI TELECOMMUNICATIONS CORPORATION

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Its Attorneys

Dated: January 12, 1998

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Summary

MCI's comments in this proceeding generally support the policies and procedures contemplated by the Commission in this matter regarding an accelerated docket for complaint proceedings. MCI fully embraces the Commission's goal of expediting formal complaint proceedings that are brought before it -- especially those involving the issue of competition. In its Comments, MCI recommends the adoption of several additional provisions designed to ensure that complaints placed on the Commission's new accelerated docket are resolved fairly and efficiently.

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COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

MCI Telecommunications Corporation (MCI), by its undersigned attorneys, hereby submits the following recommendations and comments in response to the Public Notice released by the Commission on December 12, 1997 in the above-referenced proceeding.

INTRODUCTION

On November 25, 1997, the Commission adopted, in the above-captioned matter, a Report and Order (R&O) wherein it promulgated new, streamlined procedures to be used to resolve formal complaints filed with the Commission. [1/] In that R&O, the Commission encouraged its staff to "explore and use alternative approaches to complaint adjudication designed to ensure the prompt discovery of relevant information and the full and fair resolution of disputes in the most expeditious manner possible." [2/] In that regard, the Commission's R&O also noted that its Competition Enforcement Task Force (the Task Force) was "considering whether to recommend

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1 See Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers , Report & Order, CC Docket No. 96-238, FCC 97-396 (rel. Nov. 25, 1997).

2 R&O at ¶ 5.

alternative forms of complaint adjudications and enforcement actions to ensure that the goals underlying the pro-competitive policies of the 1996 Act and the Commission's implementing rules and orders are met." [3/]

By the instant Public Notice, the Task Force and the Common Carrier Bureau (the Bureau) now seek additional comments and recommendations regarding its contemplated "accelerated docket" for complaint adjudications which would: (1) provide for the presentation of live evidence and argument in a hearing-type proceeding; and (2) operate on a 60-day time frame (or some other schedule that is more compressed than that applicable generally to complaint proceedings under the new procedures set forth in the R&O). Commenters were also asked to address the extent to which the rules set forth in the R&O could be applied to an accelerated docket. Additionally, commenters were invited to identify, where appropriate, specialized procedures or requirements that may be necessary in the context of the accelerated, hearing-style process under consideration. Commenters were instructed to restrict themselves to addressing the feasibility of using the rules discussed in the Public Notice and the regulations promulgated in the Commission's R&O, and the extent to which different requirements may be necessary for an accelerated docket.

DISCUSSION

The Commission, in its R&O, reaffirmed the fact that prompt and effective enforcement of the Telecommunications Act and of the Commission's Rules is critical to attaining the 1996

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[3] Id.

Act's goals of full and fair competition in all telecommunications markets. [4] "Such widespread competition will ensure that the American public derives the full benefit of such competition through new and better products and services at affordable rates." [5] Those goals notwithstanding, it is almost universally conceded by Congress, industry participants, and customers that "widespread competition" in local exchange markets has not yet been realized. MCI believes that this fact is primarily the result of efforts by incumbent local exchange carriers (ILECs) to hinder the efforts of competitive local exchange carriers (CLECs) to enter local exchange markets through anti-competitive behavior and litigious actions. [6] Although the anti-competitive conduct of ILECs is being vigorously challenged (both in court and before the Commission) as unlawful, MCI contends that the resolutions of these complaints have not been sufficiently expeditious to foster competition. Accordingly, MCI is pleased that the FCC is now considering the implementation of an accelerated complaint docket and recommends that the Commission adopt MCI's suggestions and recommendations related thereto.

MCI, generally, supports most of the proposed rule changes set forth in the Commission's Public Notice. The various subsections of the Commission's Public Notice proffer specific questions and comments regarding the proposed accelerated docket. MCI responds to these specific questions and comments as follows:

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4 See Report & Order at ¶ 1.

5 Id.

6 See January 12, 1998 remarks of Rep. Edward Markey (D-MA)(the Justice Department should "take a closer look at allegations of antitrust abuse and monopoly power within [Southwestern Bell's] local market. . . . The Wichita Falls lawsuit itself is ample evidence of [SBC's] clear intent to use every legal and regulatory device at its disposal to maintain its monopoly position.").

1. Need for Accelerated Docket.

With regard to the provision of services and products to end users, most industry participants would agree that time is of the essence. Each day that passes on which an ILEC engages in anti-competitive conduct usually results in escalating and significant losses by the affected CLEC. When, for example, an ILEC routinely fails to load into ILEC switches and test the Central Office NXX codes of a CLEC in an accurate and timely manner, the affected CLEC's customers will be unable to receive calls from end users. This scenario is not merely a hypothetical but, rather, a description of actual Pacific Bell and other ILEC business practices which have hindered MCI's ability to efficiently compete in the local exchange markets in the state of California and other locations. [7/] MCI's request for relief in this NXX matter has been pending for more than eight months. For each month that this NXX problem remains unresolved, MCI suffers the mounting losses of customers who become frustrated with the slow pace of resolution of their respective problems.

Accordingly, MCI suggests that disputes, such as the NXX matter described above, which: (1) concern either the issue of competition in the provision of telecommunications services, the issue of consumer choice and/or the issue of quality of local service; and (2) if not resolved expeditiously, will result in significant and escalating harm to the complainant and/or affected end users, are the types of disputes that would greatly benefit from treatment under the contemplated accelerated docket. In light of the Act's stated goal of fostering competition in

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[7] See MCI's correspondence to FCC Common Carrier Bureau Chief Regina Keeney (requesting Commission clarification regarding ILEC obligations to properly activate and test NXX codes), dated May 28, 1997.

telecommunications markets, and in consideration of the Commission's increasingly limited resources, MCI recommends that the Commission's accelerated docket should, initially, be limited to cases in concerning competition. This position is supported by the language of the Telecommunications Act, which requires the Commission to act in a manner which promotes one of its three main goals -- opening the local exchange and exchange access markets to competitive entry. [8/] Competition is "the organizing principle of the Telecommunications Act of 1996" and "is one of the cornerstones of the policy" of the FCC. [9/] Accordingly, cases involving the substantive issue of competition should, at the very least, be given priority consideration by the Task Force. It is additionally recommended that the Task Force be allowed to accept onto its accelerated docket complaints that having been pending at the Commission for six (6) months or longer. Such a provision would serve the public interest because it would enable the Commission to reduce its backlog of pending cases.

Since the enactment of the 1996 Act, MCI has vigorously endeavored to enter various local exchange markets around the country. However, as has been documented in the numerous complaint proceedings that MCI has been forced to initiate against ILECs, [10/] the former telecommunication monopolists continue to routinely engage in anti-competitive conduct which

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8 Id at ¶ 3.

9 See Remarks from December 11, 1997 speech by Federal Communications Commission Chairman William Kennard to the Practicing Law Institute.

10 See e.g., MCI v. Pacific Bell, FCC File No. E-97-18 (regarding Pacific Bell's conduct of refusing to provide to MCI the service records of customers who had placed orders to migrate away from Pacific Bell and to MCI local exchange service)(filed April 10, 1997).

has impeded MCI's and other CLECs' attempts to enter into these local exchange markets. [11/] MCI is confident that the Commission will resolve these complaint proceedings in a consistent and fair manner. However, most of these matters remain pending and, accordingly, continue to inflict mounting damages on MCI and other CLECs.

MCI suggests that, in order to prevent every prospective litigant from applying to have its case accepted onto the Task Force's accelerated docket, it is imparative that the Commission clearly articulate the criteria used to determine which matters it will agree to hear. MCI additionally recommends that the Commission clearly articulate the procedures to be followed by parties when filing post-complaint pleadings with the Task Force. For example, if the Commission allows for the transfer, to its accelerated docket, of pending cases which impact local service, litigants need to be instructed as to what procedures they must follow to effectuate such a transfer.

Finally, MCI suggests that, in order to ensure the consistent application of FCC rules and regulations, the Task Force should be empowered to resolve only those issues raised by the parties appearing before it, and should not be allowed to establish new policy. Accordingly, MCI recommends that the Task Force be required to work closely with the Commission's Policy Division on any matter, the resolution of which would potentially constitute policy-setting precedent.

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[11] The Commission, in separate proceedings, accurately accessed the ILECs' ability to act on their incentives to discourage market entry and robust competition by engaging in anti-competitive conduct. See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325 (released August 8, 1996) at ¶¶ 10 and 16.

2. Minitrial.

As noted in the Public Notice, the Bureau and the Task Force are considering whether the requirements of speed and fairness would be served by conducting minitrials of complaints accepted onto the accelerated docket. As contemplated by the Commission, these minitrials would permit the parties to present live testimony, evidence and argument to the fact-finder. Additionally, each side would be allowed to cross-examine its opponent's witnesses. The 60-day process now under consideration by the Commission contemplates that these minitrials would be heard no later than 45 days after the filing of a complaint.

MCI recommends the adoption of the minitrials procedures now contemplated by the Commission, including the proposal to allow each side an equal amount of time within which to present its case and cross examine witnesses. However, MCI strongly suggests that the Commission incorporate into its accelerated docket procedures a provision that would grant its Task Force the discretion to extend the contemplated 60-day resolution period by an additional 30 days (for a total of 90 days) in cases in which such additional time is required by such factors as complex substantive issues, extraordinary discovery issues and referrals to Administrative Law Judges. Additionally, MCI suggests that a defendant should have the same right to request an accelerated docket minitrial as a complainant would have. Such a provision is warranted, inter alia, by the issue of fairness, unique circumstances whereby a defendant may require an expedited resolution, and/or the need to dispose of a patently frivolous lawsuit. When making such a request, a defendant should be required to make the same showing as a complainant, for the purpose of demonstrating that the matter at issue is an appropriate candidate for the Commission's accelerated docket.

Additionally, the Commission should establish the clear and detailed procedures to be used to apply to have a matter placed on the Task Force's accelerated docket. For the purpose of creating a sense of certainty as to the resolution time frame for complaints, the Task Force should be required to render its decision as to whether a case will be accepted onto its accelerated docket within a specific period of time. Such a provision would help to prevent a backlog of prospective accelerated docket cases. MCI suggests that an appropriate period of time by which the Task Force should be required to render its decision as to whether a case is accepted onto its accelerated docket is seven (7) days from the date on which such an application is made by a party.

Finally, in consideration of the Commission's goal of expeditiously resolving complaint proceedings before it, MCI recommends that initial and reply briefs that are filed in accelerated docket cases be limited to ten (10) pages in length.

3. Discovery.

The amended discovery rules announced by the Commission in its R&O provide that, without a special showing, interrogatories are the only discovery that may be requested in complaint proceedings (a maximum of 15 interrogatories are allowed by complainant; 10 by defendant). Such limited discovery would render accelerated "live" proceedings useless. As is often the case in situations concerning issues of competition, a complainant may know that it is being damaged by the conduct of another carrier, but be unable to prove the unlawful nature of the conduct without information exclusively within the control of the defendant. This proof, most often, will manifest itself in the form of documents and other materials within the exclusive control of the defendant. Complainants now face the possibility of being required to prosecute

trials within 45 days, armed, more or less, with only the answers to 15 interrogatories. As a practical matter, such limited opportunity to collect evidence would make it impossible to make out a prima facie case (and in some instances, defend against one). Interrogatories generally result in the production of limited information. Accordingly, allowing additional interrogatories would not solve this problem.

Accordingly, MCI embraces and recommends the adoption of the provision contemplated by the Public Notice that would require parties to exchange all documents relevant to the issues raised in the complaint and answer at the time at which the parties file their respective initial pleadings. In light of the pre-filing requirements now contemplated by the Commission, such documents will likely be gathered by the parties before any complaint is filed. Accordingly, such a production requirement should not be burdensome to any party. MCI additionally recommends that the Commission's definition of "relevant material" include, but not be limited to: (1) information that is likely to have an influence on or affect the outcome of a claim or defense; and (2) information that competent counsel would consider necessary to prepare, evaluate or try a claim or defense. The provision contemplated by the Commission which would mandate that parties disclose materials "likely to bear significantly on any claim or defense" (emphasis added) is, arguably, ambiguous and would, accordingly, give cover to parties inappropriately attempting to avoid full disclosure. In light of the accelerated litigation time frame, an automatic disclosure of relevant materials in these proceedings would not be significantly more burdensome at the initial stage of a 45-day proceeding than it would be if it occurred a few weeks subsequent.

Because live testimony at these hearings is contemplated by the Commission, it is critical that parties be granted the right to depose witnesses expected to testify, so that the parties are

able to fully prepare for the cross-examination of those witnesses. Accordingly, MCI recommends that parties be required to identify, in their respective initial pleadings, all persons expected to testify during an accelerated hearing and to make those persons available for deposition prior to the commencement of the hearing. At a minimum, the disclosing party should be required to provide a topic-by-topic summary of its witnesses' expected testimony.

Finally, in light of the expeditious nature of the contemplated proceedings, it is vitally important that pleadings be served in a timely manner. A party's failure to serve a pleading at the time certified on its certificate of service will unfairly result in the reduction of time in which to respond thereto. The negative impact of such an occurrence is amplified by the accelerated nature of the contemplated proceedings. Accordingly, MCI recommends that the Commission set forth explicit procedures regarding the service of pleadings in accelerated proceedings. If the Task Force permits the service of pleadings via a telecopier, such service must be followed by hand-delivered service of the subject pleading, no later than the following day. Because time will be of the essence in accelerated docket proceedings, service exclusively by first-class should not be permitted.

4. Pre-Filing Procedures.

MCI supports the rule amendments considered in subsection number 4 of the Public Notice, which would require a complainant seeking acceptance onto the accelerated docket, as a precondition of such acceptance, to have attempted to undertake informal settlement discussions under the auspices of the Task Force. Having the Task Force involved in parties' pre-filing settlement discussions: (1) would ensure that the Task Force is informed of the underlying pertinent facts as it deliberates on the issue of whether or not to accept the case on the accelerated

docket; and (2) would enable the Task Force to "hit the ground running" in the event that a case is eventually accepted onto the accelerated docket. Additionally, involvement by the Task Force in pre-filing settlement discussions would likely inhibit a party's inclination to be uncooperative during this period.

In this subsection, the Commission additionally ponders to what extent, if any, the Commission's ex parte rules would be implicated by the Task Force's involvement in such pre-filing discussions between prospective parties to a potential complaint proceeding. MCI suggest that no ex parte problems would be created by such a procedure, because: (1) all parties would necessarily be involved in the pre-filing settlement discussions; and (2) no complaint proceeding would have been commenced at this stage of the parties' dispute.

5. Pleading Requirements.

Presumably, if the parties in a dispute have undertaken pre-filing settlement discussions under the auspices of the Task Force, a defendant should be in a position to answer a complaint within 7 to 10 days from the date that the complaint is filed.

6. Status Conferences.

With regard to its prospective accelerated docket, the Commission contemplates mandating that the parties' initial status conference be held no later than 15 days from the date on which the complaint was filed. It is also contemplated that initial status conferences for accelerated docket proceedings would proceed under the newly announced rules in the R&O. [12/] MCI believes that it is feasible to conduct initial status conferences pursuant to these mandates.

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[12] See R&O at ¶¶ 101-125.

7. Damages.

In its Public Notice, the Commission surmises that adjudications of damages would be extremely difficult to complete within a 60-day time frame. MCI concurs with this assessment and recommends that the Commission restrict its accelerated docket to bifurcated liability claims, with damages claims to be handled separately under the procedures set out in the Commission's R&O. Resolution of the issue of damages is not normally time-sensitive. Bifurcating accelerated dockets in the manner suggested above would allow the Commission to devote its resources to the usually time-sensitive issues of liability and of whether injunctive relief is required in order to halt escalating damages caused by unlawful conduct.

MCI must, however, suggest that once the issue of liability has been resolved in a particular accelerated docket proceeding, the Task Force must be required to resolve the issue of damages in as expeditious a manner as possible. When a litigant prevails on the issue of liability, but is made to wait indefinitely for a decision regarding the amount of damages it is entitled to, it remains less than whole.

8. Review by the Commission.

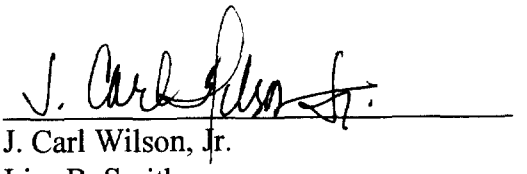
In subsection number 9 of its Public Notice, the Commission suggests that it likely would be necessary to require all briefings on any petition seeking review of an initial decision by the Task Force to be completed between 20 and 30 days of the decision's release, in order to ensure that appeals of Task Force decisions can be considered within applicable resolution deadlines. Because such a briefing schedule would help to ensure the expeditious resolution of time-sensitive formal complaints, MCI favors the briefing schedule contemplated by this subsection of the Commission's Public Notice.

CONCLUSION

For the foregoing reasons, MCI respectfully requests that the Commission adopt MCI's suggestions regarding the Commission's prospective accelerated docket.

Respectfully submitted,

MCI TELECOMMUNICATIONS CORPORATION

By: 

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Dated: January 12, 1998

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served, this 12th day of January, 1998, via hand-delivery, on the following:

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